United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1140

I.

UNITED STATES COURT OF APPEALS
For the Second Circuit

B

P/S

DOCKET NO. 76 1140

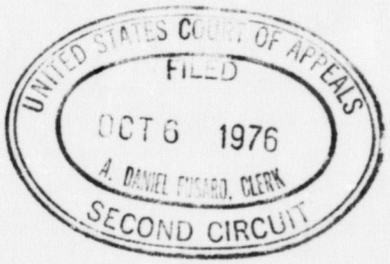
UNITED STATES OF AMERICA
Plaintiff-Appellee

V.

DAVID N. BUBAR, ET AL
Defendants-Appellants

ON APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT

Brief of Defendant-Appellant
Dennis Tiche



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Argument: December 13, 1976

TABLE OF CONTENTS

CITATIONS

CASES

STATUTES

MISCELLANEOUS

PAGE

STATEMENT OF THE CASE

The appellant Dennis Tiche and eight co-defendants were indicted on charges stemming from the destruction of Plant No. 4, Sponge Rubber Products Company, in Shelton, Connecticut, on March 1, 1975. The defendants were charged with transporting gasoline and dynamite from Pennsylvania to Connecticut and destroying the plant. The final indictment charged the appellant with conspiracy to promote arson through interstate travel and three substantive counts: interstate travel to promote arson, interstate transportation of explosives for an unlawful purpose, and possession of an unregistered firearm.

The appellant Dennis Tiche bases his appeal on several defects in the proceedings below. First, Count Four of the indictment alleges possession of an unregistered "firearm" as defined in 26 USC Sections 5845(a)(8) and (f)(1)(A). Appellant contends that the commercially useful materials which he is accused of transporting do not constitute a "firearm" under the relevant statutes.

Appellant's second objection concerns the conduct of counsel for co-defendant Bubar, a self-proclaimed psychic who allegedly predicted the fire several days in advance. The conduct of Mr. Bubar's attorney, Mr. Rudolph Zalowitz, will be discussed in detail in the argument. For the moment it is sufficient to note that his behavior was often ridiculous and sometimes absurd. Appellant Dennis Tiche contends that this made it impossible for him to receive a fair trial.

The government's case was centered around the testimony of John Shaw. Mr. Shaw, who was also a defendant in the case, admitted participation in the arson and testified against the other defendants. This testimony was particularly damaging to appellant Dennis Tiche because he had admittedly been closely associated with Mr. Shaw for a considerable time and because Mr. Shaw was the only witness to identify

him. Without Mr. Shaw's testimony, the government would have had to rely largely on circumstantial evidence.

Dennis Tiche took the stand in his own defense and denied Mr. Shaw's allegations. (Trans. p. 9594). The jury was thus called upon to choose between the stories of the two men. In the course of his defense, Tiche sought to introduce testimony by Loretta Marley to the effect that Mr. Shaw had committed perjury in an earlier case and that he had lied under cross-examination in the present case. The testimony was excluded. (T.p. 9559) The United States Attorney then questioned Miss Marley regarding Mr. Shaw's veracity. (Trans. 9559). At the conclusion of the government's examination, counsel for co-defendant Connors again sought to question Miss Marley regarding specific instances which formed the basis for her opinion. The testimony was again excluded, thus depriving the appellant of a vital line of attack against his most formidable accuser.

Both in closing argument and rebuttal the United States repeatedly referred to the failure of various defendants to offer evidence on particular issues or to rebut elements of the government's case. In the case of appellant Dennis Tiche, the United States Attorney referred to the failure to explain the source of money deposited to his account soon after the fire (T. p. 10882), to account for several phone calls (T. p. 10883), to provide receipts documenting his travels (T. 10883), and to explain his presence in New York City around the time of the fire (T. p. 10884). Appellant Tiche contends that these statements, combined with the references to the other defendants, created the impression that the defendants were required to present evidence refuting the government's accusations. The burden of proof was thus shifted to the defendants, depriving appellant Tiche of the presumption of innocence.

Appellant Tiche also contends that the trial judge failed to charge the jury on the elements of the Connecticut arson law in Count Two, and joins the arguments of co-appellant on this point.

PROCEEDINGS TO DATE

On May 8, 1975, the Grand Jury at New Haven returned an indictment consisting of twelve counts. On September 8, 1975, prior to trial, the government agreed to drop original Counts Four, (interstate travel in aid of racketeering enterprises), Five (destruction of building with explosives), Six (interstate transportation of explosives by non-licensee), Nine (making a firearm without payment of tax), Ten (interstate transportation of an unregistered firearm), and Eleven (possession of a firearm without payment of the tax). Original Count Eight (participation in an enterprise affecting interstate commerce through a pattern of racketeering activities) was dismissed before trial, while original Count Seven (carrying a firearm during the commission of a felony) was dismissed at the conclusion of the evidence. The final indictment thus consisted of four counts: (1) conspiracy to engage in interstate travel to commit arson in violation of 18 USC Section 371; (2) interstate travel to commit arson in violation of 18 USC Sections 1952 and 2; (3) interstate transportation of dynamite for an unlawful purpose in violation of 18 USC Sections 884(d) and (2); and (4) possession of an unregistered firearm as defined in 26 USC Section 5845(a) (8) and (f)(1)(A) in violation of 26 USC Sections 5861(d) and 5871 and 18 USC Section 2.

In due course Dennis Tiche was presented, pled not guilty, and elected a jury trial. Mr. Tiche was tried with eight co-defendants in a trial which began October 6, 1975 and extended over a period of four months, concluding on February 11, 1976. Both before and during the trial, Tiche made timely motions for severance from co-defendant Bubar and from the other co-defendants and for dismissal of Count Four of the final indictment, all of which were denied.

On January 19, 1976, the jury returned a verdict for appellant Tiche of guilty on all four counts. In February 1976, the appellant filed a motion for acquittal or for a new trial which was denied. On March 22, 1976, the appellant was sentenced to five years imprisonment on Count One and five years on Count Two to run consecutively and to ten years' imprisonment on Counts Three and Four to run concurrently with each other and consecutively to the sentence imposed on Count One, for a total of 15 years.

Dennis Tiche appeals from the denial of his motion for a new trial or acquittal.

ISSUES PRESENTED

I. Whether the bizarre misconduct of Attorney Zalowitz, counsel for co-defendant Bubar, so prejudiced the defense of appellant Dennis Tiche as to constitute a denial of due process?

II. Where a jury is called upon to choose between the testimony of a government witness and a defendant, and that defendant seeks to introduce the testimony of another witness to the effect that the government witness has previously committed perjury, is it an abuse of discretion for the trial court to exclude such testimony despite the clear provisions allowing it under Federal Rule of Evidence 608(b)?

III. Whether Federal statutes require registration for the possession of a potentially destructive device consisting of a collection of commercially useful and legitimate materials, where registration would amount to notification of a possessor's intent to put the materials to an illegal use?

IV. Whether repeated references in the closing remarks of the United States attorney to the appellant's failure to explain or refute elements of the government's case shifted the burden of proof to the appellant?

V. Whether the trial judge's failure to state, in the charge to the jury, the specific elements of the crime of arson in the State of Connecticut renders the jury verdict invalid as to Count Two?

ARGUMENT

I. The misconduct of co-defendant David Bubar's counsel, Mr. Zalowitz, so prejudiced the presentation of Dennis Tiche's case as to constitute a denial of due process.

Appellant Dennis Tiche was tried together with eight co-defendants in a proceeding which lasted more than three months. The thrust of the government's case against Dennis Tiche was that he, together with co-defendant David Bubar and co-indictee John W. Shaw, was a central figure in an alleged conspiracy to commit arson. The jury was asked to weigh complex evidence for and against Dennis Tiche under conditions which, even in the best of circumstances, would have raised genuine problems of confusion. In such a long trial involving so many complicated charges and so many defendants, the trial court must be particularly careful to insure that the jury will be capable of weighing the evidence in a calm, detached, and careful manner.

Appellant Dennis Tiche contends that any chance for a fair consideration of his case by the jury was foreclosed by the misconduct and ineptitude of Attorney Rudolph Zalowitz, counsel to co-defendant Bubar. It is not simply that Mr.

Zalowitz failed to present a convincing or comprehensive defense. Rather, he continually delayed the trial with frivolous objections, pointless questions, and the attempted introduction of absurdly irrelevant "evidence". He repeatedly invoked mystical and psychic phenomena to explain events leading up to and including the trial. He addressed both the court and the United States Attorney with sarcasm and disrespect, and he consistently failed to present arguments coherently.

Attorney Zalowitz repeatedly violated the American Bar Association Code of Professional Responsibility, Disciplinary Regulation 7-106(c), subsections (1) alluding to irrelevant matters, (2) persisting in irrelevant and degrading questions, (3) asserting his personal opinion as to the justness of a cause, (4) failing to comply with standards of courtesy and practice, (5) engaging in undignified and discourteous conduct, and (6) habitually violating established rules of evidence and procedure.

The transcript of the trial is virtually filled with specific examples of the bizarre misconduct of Attorney Zalowitz. On this point, Appellant Tiche hereby adopts as a part of this brief and refers the court to the supplemental appendix of co-appellant Bubar, entitled "Chronological Summary of Mistakes or Unusual Acts of Defendant's Attorney." While the

appendix is primarily concerned with the effectiveness of Attorney Zalowitz's presentation, the conduct recorded there also degraded the trial itself and impeded the efforts of the other defendants. For example, Mr. Zalowitz's insistence on the use of the word "gleam" to mean "glean" inevitably subjected the defendants, as a group, as well as Mr. Zalowitz, to ridicule. (Transcript p.3071, Appellant Bubar's appendix, p.6a). Attorney Zalowitz's mispronunciation and misuse of the word "enchilada" must have had an even more absurd effect. (T. p.1352, A., p.3a).

The transcript and the appendix abound with other examples. Mr. Zalowitz repeatedly alluded to Bubar as a "seer" and a "prophet" in the presence of the jury. (e.g., T.6999,4117). Attorney Zalowitz's summation, which has been introduced as an exhibit by Appellant Bubar, consists for the most part of an incoherent attempt to portray Mr. Bubar as a Christ figure persecuted by the forces of evil. (Summation of Attorney Zalowitz, pp. 8, 19, 20, 26, 29). This performance was merely the climax of Mr. Zalowitz's persistent and frutiless efforts to introduce testimony regarding his client's purported psychic powers. (See, for example, T. p.7491,A. p.24a; T. p.7603,A. p.26a; T. p.7645, A.27a).

Appellant Bubar's appendix also offers convincing examples of Attorney Zalowitz's ignorance of the rules of evidence and of general trial procedure. For example, he attempted to introduce as evidence or exhibits the Bible (T. p. 8654, A.37a), and a Reader's Digest article (T. p.5662,A. p.14a). His questioning of witnesses was sometimes belligerent, often irrelevant, and almost always unnecessarily drawn out.

The trial judge sometimes became exasperated with his behavior and admonished Mr. Zalowitz on several occasions. (e.g. T.p.8840,A.p.38a). Initially a ruling was made that Attorney Zalowitz would not be allowed to represent Mr. Bubar on appeal. While the Court's order of July 22, 1976 does allow Mr. Zalowitz to appear, the fact remains that if Zalowitz's behavior was such a problem at the trial, then the trial court should have taken steps to prevent the prejudicial effect of his misconduct from infecting the defense of the other defendants.

Appellant Dennis Tiche contends that the combination of misconduct and ineptitude on the part of co-counsel necessarily had the effect of provoking the jury's impatience and resentment, and in trivializing not only his client's "defense", but also the defense of Appellant Tiche. The substantial prejudice aroused in the minds of the jurors against co-defendant Bubar inevitably overflowed into unfair skepticism against Dennis Tiche.

Zalowitz's antics antagonized the jury, while his "defense" required them to accept Bubar as a psychic, if not a prophet. Attorney Zalowitz repeatedly alluded to Bubar's purported psychic powers and apparently sought to make them a key element of his client's "defense". For example, at the trial Zalowitz referred to Bubar's "prediction" of the fire several days before it occurred.

In order to believe that Tiche and Bubar were not part of the same conspiracy, the jury likely would have had to believe that Bubar had extrasensory powers. Given the likely skepticism on the part of the jury on this point, combined with the incomprehensible behavior of Attorney Zalowitz, the denial of severance motions was extremely damaging to Tiche.

This was particularly true for Tiche because he and Bubar were alleged to be central figures in the alleged conspiracy and were thus closely associated in the minds of the jurors. Verdicts against co-defendants Bubar and Dennis Tiche were returned the same day.

In joint trials "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." Schaffer v. United States, 362 U.S. 511 (1960), United States v. Johnson, 478 F. 2d 1129 (5th Cir. 1973). A severance between trials of Dennis Tiche and Reverend Bubar was called for at the joint trial because it was apparent from

the outset, and increasingly so during the course of the trial, that a joint trial could not be a fair trial in this case. The facts demonstrate that the defense of Dennis Tiche was so severely prejudiced by a joint trial that he was in effect denied a fair trial altogether. Defendant Dennis Tiche was really facing three adversaries: the government, Bubar, and Zalowitz.

The accused's right to a fair trial, guaranteed by the Sixth Amendment to the Federal Constitution, is the very essence of due process. A necessary element of a fair trial is an unbiased trier of fact, but in this joint trial it was impossible for the jury to be unbiased with respect to Dennis Tiche. The failure to provide an unbiased trier of fact constitutes a denial of due process.

In Aratari v. Cardwell, 357 F. Supp. 681 (S.D. Ohio 1973), the court granted a petition for habeus corpus where petitioner's trial judge failed to take measures to protect the defendant from the prejudicial effects of her co-defendant's unruly conduct. In the case at bar, appellant Dennis Tiche was prejudiced by the unruliness not only of a co-defendant, but of his counsel. A defendant may be gagged or removed from the courtroom, but a judge has no such control over an incompetent lawyer. If a new trial was compelled in Aratari, then a new trial is required in the present case, given the highly prejudicial misconduct of Attorney Zalowitz.

It is sufficient to require a new trial that the atmosphere surrounding the fact-finding process be so tainted as to raise the possibility of prejudice. "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused, denies the latter due process of law." Tumey v. Ohio, 273 U.S. 510 (1926), at 532. Certainly the confusion and resentment stirred by Attorney Zalowitz is a threat to justice.

The Court's denial of appellant Dennis Tiche's timely motions for severance or a new trial under the unusual facts in this case constituted a clear abuse of discretion, resulting in substantial prejudice to his defense. Under these circumstances, a new trial for Dennis Tiche is required.

II. The court erred in denying any cross-examination of Loretta Marley regarding specific instances of John Shaw's conduct probative of his truthfulness or untruthfulness.

A brief recapitulation of the facts may prove helpful. Appellant Dennis Tiche sought to introduce testimony by Loretta Marley regarding specific instances of John Shaw's conduct probative of truthfulness or untruthfulness. (T. p/p. 9550,ff). In his offer of proof (T. p.9557) counsel asserted that Miss Marley would testify to attempts on Mr.

Shaw's part to suborn perjury in an earlier case and also contradict Mr. Shaw's testimony in the present case. The testimony was excluded. (T. p. 9559). After the prosecution examined Miss Marley regarding Mr. Shaw's veracity, co-defendant Connors sought to question her regarding the basis for her opinion. (T. p.9572). The questions were objected to, and the objection was sustained. Appellant Dennis Tiche joined with the other defendants in objecting to this ruling.

The Federal Rules of Evidence clearly permit this type of inquiry. Rule 608(b)(2) provides that specific instances of a witness' conduct "may ... in the discretion of the Court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness... (a) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Rule 608(b)(2), Federal Rules of Evidence (emphasis supplied).

The original draft of the rule was amended to clarify the fact that a character witness may be cross-examined concerning specific instances of conduct by the principal witness. The rule originally provided for inquiry into the specific instances of conduct on cross-examination of "the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness." The

judiciary committee recast the provision to clarify "the antecedent of 'his' in the original Court proposal." The final version of the rule thus provides for inquiry of a character witness regarding acts by "another witness" as to whose veracity the character witness has testified. See Report of the Committee on the Judiciary, House of Representatives, 93rd Congress, First Session, No. 93-650, November 15, 1973, p. 10; Reporter's Comments on Amendments set forth in H.R. 5463, March 1974.

Nowhere does the rule suggest that the character witness must testify in support of the principal witness or that the interests of the cross-examining party must be adverse to those of the party presenting the witness. The advisory committee's note simply paraphrases the language of the rule itself: "Particular instances of conduct, though not the subject of a criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness." Advisory Committee's Note to Rule 608(b), Federal Rules of Evidence.

Rule 608 is a particular elaboration on or application of the general principle established by Rule 405(a). That rule provides that where "evidence of character or a trait of character is admissible, proof may be made by testimony as to reputation or by testimony in the form of opinion. On cross-

examination, inquiry is allowable into relevant specific instances of conduct." Rule 405(a) Federal Rules of Evidence. The rules reflect the common law tradition of allowing cross-examination concerning specific acts of misconduct. See McCormick, Evidence, 2nd Ed. Section 42, p.82.

Both Rule 608 and Rule 405 reflect a compromise between the need to provide for adequate cross-examination and the fear of creating prejudice and confusion. Some inquiry into specific instances is allowed under Rule 608, but such inquiry is limited to conduct probative of truthfulness. The advisory committee noted that "safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite." Advisory Committee's Note to Rule 608(b).

There can be little doubt that these safeguards were satisfied in the present situation. An attempt to suborn perjury is clearly reflective of untruthfulness.

The authorities are unanimous on this point. See 3 Weinstein's Evidence, United States Rules, Section 608 (05). This Circuit has held that the denial of an opportunity to present witnesses who will testify that a key government witness attempted to suborn perjury is grounds for reversal. U.S. v. Haggett, 438 F.2d 396 (2nd Cir. 1971), cert. denied 402 U.S. 946. The testimony in Haggett was admissible as

evidence of bias, but the court indicated that it was also admissible to contradict the government witness. Haggett, 438 F.2d 399-340.

It is also significant that neither Loretta Marley, the witness whom the defense sought to cross examine, nor John Shaw, to whose character she testified, was a party in this case. Where this is true, the danger of prejudice is reduced and the permissible scope of inquiry is broader. See 3 Weinstein's Evidence; The Federal Rules, Sections 608 (05) and 608 (06), pp.608-30 and 608-35.

While Rule 608(b)(2) allows the court discretion to limit cross-examination regarding particular instances of conduct, it is suggested that this discretion was abused in the present case. John Shaw was the government's chief witness; his testimony depicted the appellant as the central figure in the arson itself. Appellant Dennis Tiche denied these allegations and gave his own account of the days in question. John Shaw's credibility was therefore a crucial issue in appellant's case and without his testimony conviction was clearly unlikely. Appellant's offer of proof indicated that Loretta Marley would have offered compelling evidence on this issue. She would have (1) testified to Mr. Shaw's attempts to suborn perjury in the past, and (2) directly contradicted elements of Mr. Shaw's testimony at trial. Had the

jury been allowed to hear this testimony, it might well have entertained reasonable doubts about the government's case.

It is suggested that the testimony in question was directly probative of truthfulness or untruthfulness, that this was a crucial issue, and that the dangers of prejudice were at a minimum. Therefore, the court committed prejudicial error in excluding the testimony.

III. Count Four of the Indictment Fails to Charge an Offense Under the Governing Statute.

Count Four of the final indictment (Count 12 of the original indictment) charges the appellant Dennis Tiche and his co-defendants with possession of an unregistered firearm in violation of 26 U.S.C. Section 5861(d). The firearm is alleged to be a "bomb", as defined in 26 U.S.C. Section 5845 (f)(1)(A), consisting of dynamite, detonating caps, or primer cord, blasting caps, and gasoline. Appellant contends that the device described in the indictment is not a bomb as that term is defined in 26 U.S.C. Section 5844 (f)(1)(A).

It is clear that registration is not required for all potentially destructive devices. In U.S. v. Posnjak, 457 F.2d 1110 (2nd Cir. 1972) the Court held that 4,100 sticks of dynamite with unattached fuses and caps did not constitute a "firearm". The Court reached this conclusion despite the fact that the defendants in that case sold the dynamite knowing

that it was to be used for an unlawful purpose.

The National Firearm Act, of which 26 U.S.C. Section 5681(d) is a part, is drafted in technical language and must be technically construed. Posnjak, supra, at 1118. After examining the Act's legislative history and rationale, the Court concluded that the term "destructive device" is limited to "objectively identifiable weapons of war and 'gangster-type weapons' for which there is no commercial or legitimate use." Posnjak, supra at 1116.

Posnjak is quite clear in its insistence that the standard is to be an objective one, independent of any consideration of the plans or intentions of the possessor. Dynamite and blasting caps can obviously be used as destructive devices. But they also have a variety of legitimate commercial uses. The question of whether dynamite is a destructive device would thus depend on the intent of the possessor. In situations where registration would be required only in the event of an unlawful purpose, such registration would amount to a virtual admission of guilt. Since Congress cannot have intended to violate the registrant's privilege against self-incrimination the term "destructive device" must be limited to devices which are by definition weapons of war or gangsters and which have no legitimate uses. Posnjak, supra at 1118.

Applying the same logic, the Court reasoned that subsection (3) of 26 U.S.C. 5845(f), which covers any combination of parts to construct a destructive device as described in subsection (1), is limited to components of objectively identifiable weapons of war. It does not expand the category of destructive devices. Posnjak, supra at 1116.

United States v. Cruz, 492 F.2d 217 (2nd Cir. 1974) cert. den. 417 U.S.935) is to the same effect. In that case the court held that a molotov cocktail is a destructive device because it has "no use besides destruction" and therefore falls into the category of objectively destructive weapons of war. Cruz, supra, at 219.

The alleged device in question is not an objectively identifiable weapon of war. Rather, it is an aggregation of parts,each of which is susceptible of legal commercial use. It is not an objectively identifiable weapon of war in the obvious sense in which a molotov cocktail is a weapon of war. It can only be deemed a bomb if the possessor intends to use it as such; therefore, under Posnjak, it falls outside the statute and registration is not required.

Any other interpretation would raise the self-incrimination problems which Posnjak sought to avoid. To require the registration of a collection of otherwise legitimate materials would be to require notification of the possessor's intent to put the materials to an illegal use. This would obviously create

a "real and appreciable" danger of incrimination and prosecution, a danger which has been held sufficient to justify the assertion of the privilege against self-incrimination. Marchetti v. U.S., 390 U.S. 39 (1968); Haynes v. U.S., 390 U.S. 85 (1968), Grasso v. U.S., 390 U.S. 62 (1968).

Because the device in question is not an objectively identifiable weapon of war or a gangster-type weapon, it is not a destructive device under 26 U.S.C. 5845(f)(1)(2), and registration is not required.

IV. The Prosecutor's Closing Remarks, Which Repeatedly Referred to the Appellant's Failure to Explain or Refute Elements of the Government's Case, Shifted the Burden of Proof to the Appellant.

In his closing argument and rebuttal, the United States Attorney repeatedly alluded to the failure of the appellant and his co-defendants to refute various elements of the prosecution's case. Specifically, the prosecutor alluded in rapid succession to the appellant's failure to explain the receipt of $1,000 soon after the fire (T.p. 10882) to account for several phone calls (T. p. 10883), to provide receipts documenting his travels (T. p. 10883), and to explain his presence in New York (T. p. 10884).

As co-appellants have argued, such comments violate the Fifth Amendment rights of those defendants who chose not to testify. Griffin v. California, 380 U.S. 609 (1965). Appellant Dennis Tiche contends that they were also improper in his case. The presumption of innocence in criminal cases and the concomitant requirement that the prosecution prove every element of its case beyond a reasonable doubt are essential to our system of justice and are protected by the Due Process Clause. In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 95 Sup. Ct. 1881 (1975). This protection is present even for those

defendants who choose to testify in their own behalf, thus waiving their rights against self-incrimination.

Thus, it has been held that a prosecutor's suggestion in his closing remarks that the jury should require several defendants to explain taped wiretap evidence was reversible error. U.S. v. Smith, 500 F2 293 (6th Cir. 1974). While the defendants in that case had not taken the stand, the court stressed the fact that the prosecutor's remarks were improper because they shifted the burden of proof and abrogated the presumption of innocence in addition to creating Fifth Amendment problems. Smith, 500 F2 at 294 and 297. The convictions were reversed despite a cautionary instruction by the trial court that the prosecutor's remarks were improper and must be disregarded.

The cumulative effect of the United States Attorney's mands for explanations or evidence from the appellant and his co-defendants was to create the impression that the appellant was required to produce evidence to prove his innocence. This shift in the burden of proof denied the appellant due process of law and requires that a new trial be ordered. Smith, supra.

V. The Judge's Charge to the Jury on Count Two did not specify the Elements of Connecticut Arson.

Appellant Tiche hereby adopts and joins in the arguments of co-appellants on this point.

CONCLUSION

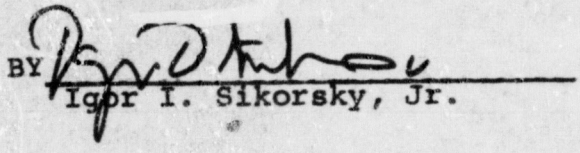
Appellant contends that the conviction under Count Four - possession of an unregistered firearm must fail because the indictment fails to state an offense under the governing statute.

As to Count Two, it is suggested that the trial court's failure to charge with regard to the elements of arson under Connecticut law also constitutes reversible error.

In regard to the remaining convictions, the misconduct of counsel for co-defendant Bubar, the exclusion of testimony undermining the credibility of the government's key witness, and the United States Attorney's references to the appellant's duty to explain himself have in themselves and in combination denied the appellant the due process of law and the fair trial to which he is entitled.

For these reasons, appellant's conviction under Count Four of the indictment should be reversed and remanded with instructions to dismiss this charge. The remaining convictions should be reversed and remanded for a new trial.

DEFENDANT-APPELLANT
DENNIS TICHE

BY 
Igor I. Sikorsky, Jr.

UNITED STATES COURT OF APPEALS

For the Second Circuit

DOCKET NO. 76 1140

UNITED STATES OF AMERICA

Plaintiff- Appellee

v.

DAVID N. BUBAR, ET AL

Defendants-Appellants

CERTIFICATION OF SERVICE

This is to certify that on the 24th day of September, 1976 a copy of Brief of Defendant-Appellant Dennis Tiche was mailed, postage prepaid, addressed to the following:

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